

MISSOURI COURT OF APPEALS WESTERN DISTRICT

STATE OF MISSOURI,

Appellant,

v.

LLOYD E. FOWLER,

Respondent.

DOCKET NUMBER WD77167

Date: May 12, 2015

Appeal from:

Jackson County Circuit Court

The Honorable Kathleen A. Forsyth, Judge

Appellate Judges:

Division Four: Alok Ahuja, C.J., and Joseph M. Ellis and James E. Welsh, JJ.

Attorneys:

Gabriel E. Harris, Jefferson City, MO for appellant

Jonathan D. Bailey, Gregory A. Doty, Kansas City, MO for respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

STATE OF MISSOURI

v.

LLOYD E. FOWLER,

Appellant,

Respondent.

WD77167

Jackson County

On July 30, 2009, Detective Eric Benson of the Kansas City Missouri Police Department applied for a search warrant for Respondent Lloyd Fowler's residence. The warrant application related that "a detective with the Kansas City Missouri Police Department, Street Crimes Unit" was informed by a confidential informant that Fowler resided at 1228A E. 4th Street in Kansas City, "and sold purported Cocaine Base from his apartment." The warrant application further recounted that the detective and the confidential informant conducted a controlled drug purchase from Fowler at his residence on July 28, 2009, at which time the informant procured from Fowler a substance which field-tested positive for cocaine.

Although the search warrant application was attested by Detective Benson, he acknowledged during a deposition that he was acting merely as an "Administrative Detective" responsible for submitting the warrant application, but that he had no direct involvement in the underlying narcotics investigation, and no personal knowledge of the information stated in the warrant application. Instead, the information contained within the warrant application was provided to Detective Benson by the detective who actually conducted the investigation.

The search warrant was issued by an associate circuit court judge on July 30, and was executed at Fowler's residence on August 5, 2009. During the execution of the search warrant, police found approximately 0.8 grams of purported cocaine base.

Fowler was charged with one count of possession of a controlled substance, a Class C felony. He filed a motion to suppress the evidence found during the execution of the search warrant. Following a suppression hearing, the circuit court granted Fowler's motion to suppress, finding that the warrant application was insufficient to establish probable cause and that the good-faith exception to the exclusionary rule was inapplicable under the circumstances. The State then filed this interlocutory appeal.

REVERSED.

Division Four holds:

Fowler's primary contention is that the affidavit supporting the search warrant is insufficient to support a finding of probable cause because it contains multiple levels of hearsay, each of which lacks the necessary indicia of reliability. An affidavit of a police officer relying on a statement made by someone else may be sufficient to support a finding of probable cause, however, if there is a "substantial basis" for crediting the hearsay statements.

With respect to the information supplied to Detective Benson by the case detective, the Missouri Supreme Court has held that a fellow law enforcement officer is a reliable source, and that no special showing of reliability need be made with respect to information received from a fellow officer.

With respect to the information concerning the details of the controlled drug purchase received from the confidential informant, that information likewise bears sufficient indicia of responsibility. The confidential informant's report that Fowler was selling cocaine from his apartment was corroborated by the confidential informant's arrangement of a controlled drug purchase from Fowler at that address. The confidential informant's detailed statements concerning what the informant observed inside Fowler's apartment during the controlled drug purchase – where Fowler stored his drugs, and his possession of a firearm – bear the unmistakable marks of firsthand observation, and are entitled to some measure of credibility for that reason. In addition, those observations are corroborated, in substantial part, by the fact that a law enforcement officer personally observed the confidential informant arrange, and execute, a purchase of crack cocaine from Fowler.

Although Detective Benson's affidavit may be poorly drafted, unlike the concurring opinion we conclude that that affidavit sufficiently discloses that the information contained in the affidavit is derived from another law enforcement officer, and from a confidential informant with whom the other officer dealt. The hearsay nature of the information in the affidavit was not concealed from the warrant-issuing judge.

Ellis, J. concurring would hold:

(1) Were this Court simply determining whether the issuing judge had a substantial basis for concluding that probable cause existed, which is ordinarily the scope of our review, our analysis would have to be limited to the four corners of the Affidavit/Application for Search Warrant executed by Detective Benson. On the face of the document, if Detective Benson had first-hand knowledge of the matters sworn to therein and observed the money and drugs exchange hands, there was clearly more than a sufficient basis for the issuing judge to have found probable cause to support the issuance of a search warrant. Viewing the Affidavit/Application in the light most favorable to the issuing court, no hearsay problem is apparent on the face of the document.

(2) The only circumstance under which the trial court, and subsequently this Court, could properly consider evidence outside the warrant, as both clearly do in order to determine that the Affidavit/Application contains multiple layers of hearsay, would be if a proper challenge were made under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Absent a

proper *Franks* challenge, no such evidence should have been considered, and there is no hearsay issue to be considered in this case.

(3) The basis for Fowler's motion to suppress was that some of the facts asserted in the affidavit were actually based upon hearsay rather than firsthand observation. He relied upon deposition testimony attached to his motion and argued that, when the hearsay nature of the information contained in the affidavit is considered, the affidavit is insufficient to support a finding of probable cause.

(4) To make a *Franks* claim, there must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. When a defendant has made a proper pleading and offer as required by *Franks*, the defendant is entitled to a hearing to demonstrate the contentions asserted. In the case at bar, in bringing his motion to suppress, *Fowler* did not specifically allege that the misleading or false aspects of the warrant affidavit were the result of deliberate falsehood or a reckless disregard for the truth on the part of the police, and he made no reference to *Franks*.

(5) But even if we assume, *arguendo*, that Fowler implicitly raised a *Franks* claim and that the evidence presented at the hearing established that the police deliberately or recklessly failed to attribute the hearsay information contained in the affidavit, we would still have to conclude the search warrant was valid and that the trial court erred in suppressing the evidence. In order for the fruits of the search to require suppression under *Franks*, the sufficiency of the warrant application must be assessed with the falsehoods removed. If the contents of the warrant application with the falsehoods removed is still sufficient to establish probable cause, the warrant will not be voided, and the fruits of the warrant will not be suppressed. Here, had the officers properly attributed the hearsay contained in the affidavit, the affidavit would still have contained sufficient facts to establish probable cause.

(6) Information conveyed by one law enforcement officer to another requires no special showing of reliability, and, accordingly, attribution of the information having been provided to Detective Benson by the undercover officer is of little import under the circumstances of this case.

(7) The confidential informant personally observed the defendant with drugs and firearms in the apartment, and there was ample corroboration of the informant's statements to the officer. The officer witnessed the informant making the telephone call to Fowler and saw Fowler meet with the informant outside the apartment building at the designated time. In addition, he witnessed the informant leave the car with the buy money, enter Fowler's apartment building with him, and return a short time later with a substance that tested positive for cocaine. These observations together provide more than sufficient corroboration for the informant's statements to be accepted as reliable. In short, under the totality of the circumstances, there was a substantial basis for concluding there was a fair probability that contraband and evidence of criminal activity would be found at Fowler's residence. The court erred in ruling otherwise.

(8) While not the case herein, the concealment of the hearsay nature of facts set forth by the police in a warrant application and/or supporting affidavit might well warrant the suppression in a case where a *Franks* claim has been properly asserted and proven. Based on the existing case law and common sense, law enforcement officers must be deemed to be aware that judges, in deciding whether probable cause exists to justify the issuance of a search warrant, are required to assess the veracity and basis of knowledge of informants providing hearsay information. Armed with such knowledge, it is reckless for a law enforcement officer to omit from an affidavit the fact that information sworn to therein is based upon hearsay and to instead state such information in a manner that implies firsthand knowledge. Absent identification of the information as hearsay, the judge or magistrate is not placed on notice of the need to assess the credibility of the informant and/or any independent corroboration of the hearsay statements.

(9) For all these reasons, I would strongly encourage all law enforcement agencies to instruct officers regarding the attribution of hearsay in warrant applications, especially with regard to distinguishing between what was actually observed by an officer and what was instead conveyed to the officer through statements made by a witness or informant. Under the right circumstances, the failure to properly identify and attribute such hearsay could result in the suppression of evidence in future cases.

Before: Division Four: Alok Ahuja, C.J., and Joseph M. Ellis and James E. Welsh, JJ.

Opinion by: Alok Ahuja, Judge

May 12, 2015

Concurring Opinion by: Joseph M. Ellis, Judge

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